

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	:	CIVIL ACTION
	:	
vs.	:	
	:	
MARCELLAS HOFFMAN	:	NO. 01-169

MEMORANDUM

ROBERT F. KELLY, Sr. J.

OCTOBER 24, 2006

This case is once again before the Court pursuant to the Order of the Third Circuit Court of Appeals dated September 13, 2005, affirming Hoffman's conviction but vacating the sentence in light of United States v. Booker, 543 U.S. 220 (2005). The case was then remanded to this Court for resentencing.

While the case was on remand to this Court, Hoffman's new counsel filed a motion for new trial claiming after discovered evidence under Fed. R. Crim. P. 33.

This Court initially denied this motion as untimely because it did not appear to raise a claim based upon newly discovered evidence. We later vacated that Order calling on Hoffman's attorney to set out his allegations in more specific detail. That has been done and additional briefs have been filed. The issue is now before this Court for decision.

BACKGROUND

On March 6, 2003, the federal grand jury returned a Second Superseding Indictment against Hoffman charging him with conspiracy to distribute and to possess with intent to distribute in excess of 100 grams of heroin and in excess of 500 grams of cocaine, in violation of Title 21, United States Code, Section 846 (Count One); attempting to possess with intent to

distribute in excess of 100 grams, that is approximately 390 grams of heroin, in violation of Title 21, United States Code, Section 846 (Count Two); use and carrying of a firearm during and in relation to a drug trafficking offense, in violation of Title 18, United States Code, Section 924(c)(1)(A) (Count Three); conspiracy to commit robbery affecting interstate commerce, in violation of Title 18, United States Code, Sections 1951(b)(1) and (b)(3) (Count Four); using and carrying a firearm during and in relation to a crime of violence, in violation of Title 18, United States Code, Section 924(c) (Count Five); and felon-in-possession of a firearm, in violation of Title 18, United States Code, Sections 922(g) and 924(e) (Count Six).

The evidence at trial established that Juan Rosado ran a multi-million dollar drug organization distributing cocaine and heroin in Philadelphia and the surrounding areas. Hoffman was one of Rosado's distributors. Hoffman began purchasing heroin and cocaine from Rosado in the summer of 2000. At the first drug sale, Hoffman bought 250 grams of cocaine for \$7,000, paying cash for half the drugs and taking the other half on consignment. A few days later Hoffman told Rosado that he had "finished with the drugs" and that he wished to purchase more. N.T. 58, 10/7/03. At this second meeting Hoffman brought the \$3,500 due for the drugs he had purchased on consignment and an additional \$7,000 to buy more drugs. At a later meeting, Hoffman informed Rosado that "he could get rid of a truckload of drugs in Virginia and that he just needed somebody that could supply him with good quantities and good price." N.T. 59, 10/7/03. Hoffman thereafter bought narcotics from Rosado on many occasions for sale in Virginia.

In early 2001, Hoffman decided to rob Rosado and enlisted the help of a former co-worker, Gary Oliver. Hoffman telephoned Rosado and told him that he was coming to

Philadelphia with \$30,000 to purchase 500 grams of heroin and a kilogram of cocaine. Oliver testified that on the morning of January 20, 2001, he drove to Hoffman's house to pick him up and that when Hoffman came out of his house he was carrying a "bag with a couple of handguns in it and one of the butts of the guns was hanging out." N.T. p. 10, 10/8/03. The two men then drove to Camden, New Jersey where they met Hoffman's cousin "Casbah." The three men then drove to meet Rosado at Porky's Point restaurant.

Rosado picked up 390 grams of heroin for Hoffman, but not the cocaine requested because he had decided he was not ready "to do any more business with [Hoffman]." N.T. p. 61, 10/4/03. Rosado decided to meet Hoffman at 5911 Frontenac Street, Rosado's stash house. That evening, Rosado put the heroin in his truck and drove with his wife and mother-in-law to the Frontenac Street house. He sent David Vasquez, one of his employees, to meet Hoffman at Porky's Point and bring him back to the Frontenac Street house.

Vasquez did so and told Hoffman, Oliver, and Casbah to follow him to Frontenac Street. After arriving there, Hoffman gave one gun to Oliver, one to Casbah, and kept one for himself. Hoffman and Oliver followed Vasquez into the house while Casbah waited outside. Rosado had not yet arrived. Once inside, Hoffman gave Vasquez only \$16,000, not the agreed upon \$30,000. After Vasquez demanded the remaining \$14,000, Hoffman and Oliver pointed their guns at Vasquez, and Hoffman handcuffed him and demanded to know where the drugs and money were located. Vasquez answered that Rosado was bringing the drugs, and he was then thrown on the floor and pistol whipped by Hoffman, who shot him in the leg.

When Rosado arrived, he met Hoffman and they went to the second floor where Hoffman pointed a gun at Rosado, showed him a badge, told him he was under arrest and

handcuffed him. Hoffman then demanded the drugs. Rosado told him the drugs were in the truck and that he would get them. Before they went to the truck, Hoffman searched Rosado and took \$1,000 in cash, his credit cards, and his license. At some point during this time Hoffman also took 800-900 grams of cocaine from the kitchen.

After exiting the Frontenac Street house, Hoffman placed Rosado in his truck with Casbah and walked towards Rosado's truck. Rosado freed himself, jumped out of Hoffman's truck, and ran towards his own truck. Hoffman chased Rosado and fired at him, hitting him once in the buttocks and grazing his leg. Rosado's wife began driving the truck towards the two men. Hoffman shot at the truck but ran out of bullets. Rosado then jumped into the truck and drove away, but Rosado's wife noted the license plate number of Hoffman's truck.

A short time later, Rosado's truck was pulled over by police. Rosado informed the police he had been the victim of a shooting and his wife gave the police Hoffman's license plate number. Based on information received from Rosado, the police then searched the Frontenac Street house, where they discovered Vasquez and Oliver, whom they detained, and recovered drugs, drug paraphernalia, and a loaded firearm.

That evening a police officer observed Hoffman's truck run a red light in Camden, New Jersey. The officer pulled Hoffman over and, as he approached observed Hoffman "making all kind[s] of movements in the vehicle." N.T. p. 78, 10/8/03. The officer ordered Hoffman to place his hands on the wheel, but Hoffman failed to comply. The officer then asked for Hoffman's documentation. Hoffman responded that he had left the documents at a friend's house. The officer ordered Hoffman to exit the car. The officer testified that Hoffman became "rambunctious" and began to "push off." The officer then conducted a pat down and felt

something in Hoffman's upper left-hand pocket. The officer shined his flashlight into the pocket and was able to see it was a box of hollow-point ammunition. After securing Hoffman and Casbah, who was in the truck, the officer performed an inventory search of the truck and found a loaded gun and several credit cards in the name of Roberto Roman, the alias used by Rosado. The officer took Hoffman into custody. He later posted bail and was released.

On January 25, 2001, the officer who had arrested Hoffman learned that there may have been an outstanding warrant for Hoffman or his vehicle. The officer went to the address Hoffman had given him and observed Hoffman on the street. When Hoffman saw the police he started to run but was caught and arrested. A federal warrant was issued for Hoffman on February 1, 2001, and he was transferred from state to federal custody on April 30, 2001. He was arraigned on May 7, 2001.¹

APPLICABLE LAW

A new trial based on newly discovered evidence is warranted only when all five of the following requirements are satisfied: “(a) the evidence must be[,] in fact, newly discovered, i.e., discovered since trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) evidence relied on[] must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.” United States v. Jasin, 280 F.3d 355, 361 (3d Cir. 2002) (quoting United States v. Iannelli, 528 F.2d 1290, 1292 (3d Cir. 1976)).

¹This factual recitation is taken from the Third Circuit Opinion U.S. v. Hoffman, 148 Fed. Appx. 122 (2005).

As the Third Circuit has held, a defendant moving for a new trial on the basis of newly discovered evidence faces “a ‘heavy burden’ in meeting these requirements.” United States v. Saada, 212 F.3d 210, 216 (3d Cir. 2000) (citing United States v. Ashfield, 735 F.2d 101, 112 (3d Cir. 1984)). If a defendant is unable to meet any one of these five requirements, his request for a new trial on the basis of newly discovered evidence must be denied. See United States v. Barbosa, 271 F.3d 438, 468 (3d Cir. 2001) (denying newly discovered evidence claim where defendant established some, but not all, requirements).

DISCUSSION

The alleged new evidence relates to the testimony of Detective Andrew Callaghan relating to phone calls from Hoffman to Rosado or members of his organization. This evidence falls into two categories: (1) inaccuracies in the summary exhibit used by Detective Callaghan and (2) inaccuracies in that some of the numbers Detective Callaghan attributed to the Rosado drug organization in fact belonged to legitimate businesses.

At trial the government placed in evidence, without objection, Exhibit 303 which was a computer disk containing the record of telephone calls made from Marcellas Hoffman’s cell phone, provided by AT&T. N.T. 46, 10/9/03. Detective Callaghan analyzed these records, which were voluminous. For example, for a one month period from December 22, 2000 to January 25, 2001 there were 69 pages of calls from Hoffman’s cell phone, each page contained 30-35 calls. N.T. 48, 10/9/03. Detective Callaghan wanted to isolate the calls from Hoffman’s cell phone to “members of the Rosado organization”. Using a computer he filtered out all the area codes called from Hoffman’s phone with the exception of area codes 215 and 610. N.T. 48, 49, 10/9/03.

The government agrees that the summary exhibit used by Detective Callaghan

contains errors. As a result of an error in transferring the phone numbers from the raw data disk 303 to the summary exhibit, the summary exhibit incorrectly lists that on January 20, 2001 there were 14 calls to a single phone number: 610-905-4663. As the raw data sets forth in Exhibit 303 however, on January 20, 2001 there were not 14 calls to this one number. However, there were 14 calls to numbers identified as associated with the Rosado drug organization. These 14 calls were to a variety of different numbers in the 610 and 215 area codes. In other words, the summary exhibit was accurate to the extent that it showed that the defendant's phone was used to make 14 calls to phone numbers identified as associated with the Rosado drug organization but was inaccurate to the extent that it represented that all the calls were made to a single phone number.

The same type of data transfer error was made with respect to the calls reported for December 26, 2000 and January 22, 2001 through January 25, 2001. For example, for December 26, 2001, the summary exhibit lists 10 phone calls to 610-979-0259. Exhibit 303 confirms that there were 10 calls to phone numbers identified with the Rosado organization, but just not to that single phone number.² For January 22, 2001, the summary exhibit incorrectly lists eight calls to 610-979-0259. In fact, as the raw data sets forth in Exhibit 303, there were eight calls to phone numbers identified as associated with the Rosado drug organization but they were to a variety of different numbers not to that single number.

For January 23, 24 and 25, 2001 the summary exhibit lists 1, 2 and 19 phone calls respectively to 610-979-0259. Again, Exhibit 303 confirms that on each day, those phone calls were made to phone numbers identified as associated with the Rosado drug organization, but not

²Detective Callaghan testified that these calls were made on January 26, 2001. The summary exhibit correctly states however that the calls were made December 26, 2000.

to a single phone number as listed in the summary exhibit.

The Defendant bears the burden of showing that the purported newly discovered evidence is in fact, new evidence. The Defendant relies upon telephone records subpoenaed from AT&T Wireless after the trial date as the basis of his newly discovered evidence claim. But those records are the same telephone call records originally contained in Exhibit 303. In other words, the Defendant obtained call records that were already admitted at trial. They are not “newly discovered” records.

As the government argues, what the Defendant is really asserting is that the errors in the summary exhibit are newly discovered. As the Third Circuit has held in the case of United States v. Cimer, 459 F.3d 452 (3d Cir. 2006), merely discovering errors in evidence admitted at trial does not constitute new evidence.

Even assuming for the sake of argument that the errors identified by the Defendant constituted new evidence, the Defendant must still meet the other elements of the *Iannelli* test. The Defendant cannot meet his burden of showing that the errors in the summary exhibit are either material to the issue of his connection to the Rosado drug organization or that they would probably produce an acquittal at trial. The probative value of a corrected summary exhibit would be exactly the same at any retrial.

As can be seen from the facts contained in the background materials, *supra*, there was an enormous amount of evidence produced at trial pointing to the guilt of Hoffman totally separate from the telephone calls that are the subject of the current motion. In fact, we note that in its opinion when summarizing the evidence in the case the Third Circuit did not even mention the telephone calls between Hoffman and the Rosado organization. They were a relatively

unimportant part of this trial and the discrepancy between the raw data and the summary exhibit had no effect on the outcome of the case.

The Defendant claims a second category of inaccuracies arises out of the fact that three of the phone numbers in the 215 area code belong to legitimate businesses and are not related to the Rosado drug organization. Out of all of the phone calls identified by Detective Callaghan to be calls from the Defendant's cell phone to telephone numbers associated with the Rosado drug organization only four calls were to phone numbers the Defendant now asserts were legitimate businesses. Specifically, with respect to January 22, 2001, out of the eight identified calls, one call was made to an Indian restaurant. With respect to a call made on January 23, 2001, that call was also made to the Indian restaurant. With respect to the calls made on January 25, 2001, out of the 19 identified calls one was made to the law offices of Brett Batoff and one call was made to the Indian restaurant.

The Defendant's claim in this regard fails for the reason that this evidence is at best impeaching material and not of such a nature that on re-trial the Defendant would probably be acquitted.

Simply showing that four of the calls identified by Detective Callaghan as associated with the Rosado drug organization actually belong to legitimate businesses, does nothing to undermine the rest of the telephone call evidence showing a large number of calls that were made from the Defendant's cell phone to numbers identified as associated with the Rosado drug organization. Nor does it do anything to undermine the overwhelming evidence referred to above connecting the Defendant to the Rosado drug organization.

I therefore enter the following Order.

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ORDER

AND NOW, this 24th day of October, 2006, Defendant's Motion for a New Trial (Doc. No. 183) based upon after discovered evidence is hereby **DENIED**.

SO ORDERED.

BY THE COURT:

/s/ Robert F. Kelly
ROBERT F. KELLY
SENIOR JUDGE